BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KAREY J. WOLSTENHOLM	)	
Claimant	)	
	)	
VS.	)	Docket No. 267,579
	)	
JOHNSON COUNTY	)	
Self-Insured Respondent	)	

ORDER

Both parties requested review of the June 22, 2004 Award by Administrative Law Judge Steven J. Howard (ALJ). The Board heard oral argument on November 30, 2004.

APPEARANCES

James R. Shetlar, of Overland Park, Kansas, appeared for the claimant. Eric T. Lanham, of Kansas City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties stipulated at oral argument that claimant's functional impairment was 15 percent.[1]

ISSUES

The ALJ awarded claimant a 33.19 percent work disability based upon a task loss of 48.875 percent and a wage loss of 17.5 percent. These figures represent an average of all the work disability evidence offered by the parties, including an imputed wage of $571.20.

[1] The ALJ's Award made no finding with respect to claimant's functional impairment.

Both parties appealed the ALJ's Award alleging a variety of errors. At oral argument, it became clear that the principal dispute stems from the post-injury wage imputed to the claimant for purposes of calculating her work disability. The claimant asserts the ALJ miscalculated the task loss which, if corrected, would increase her overall average task loss to 51.6 percent rather than the 48.875 percent found by the ALJ. Claimant further argues that the opinions expressed by respondent's vocational expert were unrealistic given claimant's true abilities. Claimant believes the ALJ erred in using those opinions when determining the appropriate post-injury wage to impute to her for purposes of the wage loss component of her alleged work disability.

Finally, claimant contends that same vocational expert overstated the value of fringe benefits available in the open market, thus further diluting claimant's wage loss and ultimate work disability. Claimant seeks a modification of the ALJ's Award, increasing the work disability to 43.8 percent.[2]

Respondent cross-appealed arguing the evidence supports a finding that claimant is capable of earning a comparable wage and, is therefore, not entitled to work disability benefits.[3] Rather, respondent contends claimant's recovery is limited to her functional impairment which it stipulated is 15 percent. Accordingly, respondent requests the Board modify the ALJ's Award.

The only issue for the Board to address is the appropriateness of the ALJ's findings of fact regarding the claimant's task and wage loss for purposes of determining work disability under K.S.A. 44-510e(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable injury on May 4, 1999, while working for respondent as a paramedic. Following a course of conservative treatment, claimant had a discectomy on December 10, 1999. This surgery was performed by Dr. Daniel M. Downs, a local orthopaedic surgeon. By all accounts claimant has had a good recovery. Nonetheless, it is uncontroverted that she remains under permanent restrictions which preclude her from resuming her former employment with respondent as a paramedic.

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[2] This is the figure reflected in claimant's brief to the Board. However, at oral argument, claimant's counsel suggested claimant was entitled to a work disability of 60 percent.

[3] Respondent does not take issue with the ALJ's finding with respect to claimant's task loss.

According to Dr. Downs, the treating physician, claimant was assigned the following restrictions: 20-30 pounds lifting from the floor only occasionally, no frequent lifting from the floor, no frequent lifting from table height and only occasional lifting from table height of up to 30-40 pounds. Overhead lifting was limited to an occasional 5-10 pounds with no frequent movements. Claimant was also limited to carrying items less than 30 feet on an occasional basis and was encouraged to use a cart to do even that. She was restricted from crawling, duck walking or squatting and should only occasionally bend or reach below her shoulder. Claimant was permitted to frequently reach at the shoulder height, but could only occasionally reach above her shoulder.[4]

Dr. Downs was asked to review two sets of tasks and provide an opinion as to claimant's task loss. Based upon the list provided by Michael Dreiling, Dr. Downs testified that claimant had lost the ability to perform 14 of 18 tasks (78%). When asked to review the list prepared by Gary Weimholt, Dr. Downs opined that claimant had lost the ability to perform 13 of 24 tasks (54%). With respect to Mr. Weimholt's list, Dr. Downs testified that as many as 5 of the tasks were described in such a way that he believed claimant was able to perform them, but, if certain aspects of each of the tasks required claimant to lift more frequently or more significant weights, then one or more of these 5 tasks might fall outside her restrictions, thus potentially increasing her task loss up to 75 percent.

In contrast to this testimony was that offered by Dr. Vito J. Carabetta, a board certified physiatrist, who was appointed by the ALJ to perform an independent medical examination pursuant to K.S.A. 44-510e. Like Dr. Downs, Dr. Carabetta imposed restrictions upon claimant. They were as follows: no carrying over 25 pounds in each hand up or down stairs; no carrying over 65 pounds; no dragging over 60 pounds for more than 20 feet; lifting up to 73 pounds; and on an appliance weighing approximately 18 pounds claimant may carry an additional 73 pounds up or down two flights of stairs for a total of 91 pounds.[5]

Dr. Carabetta was asked to speak to claimant's task loss following a review of the vocational analyses offered by Mr. Weimholt and Mr. Dreiling. Dr. Carabetta testified that claimant has lost the ability to perform 10 of the 24 tasks (42%) identified by Mr. Weimholt. He further testified that of the total 18 tasks identified by Mr. Dreiling, claimant had lost the ability to perform at least 10 and possibly an additional 2. This translates to at least a 56 percent task loss and possibly as much as 67 percent.

Both vocational specialists were asked to provide an opinion as to claimant's capacity to earn wages. Mr. Dreiling interviewed claimant and concluded claimant's educational and vocational experience gives her the capacity to earn $10 per hour working

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[4] Downs Depo., Ex. 1 at 1.

[5] Carabetta Depo., Ex. B at 4 (July 25, 2002 IME Report).

full-time plus fringe benefits, which may run from 10 to 35 percent of the employee's wage, depending on the size of the employer.

Gary Weimholt was retained by respondent and interestingly enough, did not interview claimant. Instead, he reviewed Mr. Dreiling's report and consulted various sources that he considered helpful, including America's Job Bank, the Kansas Wage Survey and a computer software website. Mr. Weimholt testified that given claimant's vocational history in the medical field and the fact that she has an above average learning ability, claimant had the capacity to earn $506 per week based on the Kansas Wage Survey, while another source suggested she could earn $426 per week. Among the jobs he felt she could perform was that of a medical assistant, although claimant would likely have to return to school to perform this job. There were other jobs he identified as well, but in nearly every instance, she would have to return to school to obtain further education in order to meet the criteria necessary to those jobs.

Mr. Weimholt also testified that should claimant obtain employment in the healthcare industry earning an average of $506 per week, she could expect fringe benefits ranging from 45 percent to 64 percent of her salary. Thus, when the fringe benefits are included within the total salary package, it is respondent's belief that claimant could earn $779.24 a week, a sum that "easily exceeds ninety percent of her pre-injury average weekly wage."[6]

The ALJ appears to have averaged the wage and task loss figures offered by both parties, discounting some of the tasks due to some uncertainty expressed by each of the physicians and ultimately assessed a 33.19 percent work disability based upon a 48.875 percent task loss and a 17.5 percent wage loss. This wage loss includes an average of the opinions offered by each vocational expert relating to both a base wage as well as fringe benefits. For the reasons set forth below, the Board finds the ALJ's award must be modified.

Permanent partial general disability is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess

[6] Respondent's Brief at 5 (filed Sept. 8, 2004). Claimant's pre-injury base average weekly wage was $692.00.

> of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk* and *Copeland*.[7] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the fact finder must determine an appropriate post-injury wage based on all the evidence before it.

Here, the claimant seems to concede that the ALJ appropriately imputed a wage to her as she has voluntarily remained out of the job market since her accident, choosing to remain a full-time mother to her three children. Thus, it is not whether to impute a wage that is in dispute, but the amount of that imputed wage, including fringe benefits, that is the central point of both parties' arguments.

Claimant maintains the imputed wage found by the ALJ is artificially inflated. Claimant further suggests that in order to avoid "unnecessary confusion to the wage computation by trying to figure in a possible benefits package",[8] the Board should just disregard the value of fringe benefits paid by respondent. Thus, the post-injury wage can be compared "strictly dollar-to-dollar" and avoid speculation.[9]

Respondent stridently maintains the evidence indicates claimant's educational and vocational background qualify her for jobs that pay a wage, when including the fringe benefits, that are within 90 percent of her pre-injury wage. Thus, respondent contends claimant is not qualified for a work disability and is limited to her functional impairment.

Turning first to the imputed base wage, the ALJ found a base wage of $466, which is nothing more than an average of $426 and $506. The difficulty here is that the higher figure represents a job in the medical field for which claimant is presently not qualified and would require additional education and training. Both vocational specialists testified that

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[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] Claimant's Brief at 4 (filed Aug. 9, 2004).

[9] *Id.* at 5.

she could earn $10 an hour given her present skills and background. The greater weight of the evidence suggests that claimant could, with her present restrictions and skills, obtain employment earning $10 per hour, or $400 per week. Thus, the Board modifies the imputed post-injury base wage to $400.

Turning now to the fringe benefits, the Board notes that the stipulated value of the benefits paid by respondent was $12.50 per week, which was 2 percent of claimant's base wage. In stark contrast, Mr. Dreiling testified claimant could expect fringe benefits to be approximately 10 to 35 percent of the base wage depending on the size of the employer, while Mr. Weimholt testified that fringe benefits ranged from 35-45 percent of base wages. Mr. Weimholt further testified that fringe benefits in the healthcare industry would range from 45 percent to as much as 64 percent of base salary.[10]

There is very little explanation in the record as to why there would be such a wide range in fringe benefits and why respondent's actual benefit package was so low. It may be merely a function of her electing not to take such benefits as they were available to her through her spouse. It may be that the respondent doesn't provide a fringe benefit package that keeps pace with the average available from other surrounding employers. Whether either or both scenarios are in fact the case is unknown and would require the Board to speculate.

While claimant's argument that the issue of fringe benefits should simply be disregarded altogether is appealing, particularly when there is such a vast disparity between claimant's actual benefit package and that which the vocational experts suggest is available, there is no statutory authority for excluding the fringe benefits from the calculation either for purposes of pre-injury or post-injury average weekly wage purposes. Thus, the Board must consider this issue.

The ALJ seemed to disregard Mr. Weimholt's fringe benefits estimate of 45 to 64 percent, which was related solely to the health field, and instead elected to average the range of estimates offered by each expert and then averaged the two resulting opinions. The Board has reviewed the record as a whole and concludes that the greater weight of the evidence suggests a 35 percent fringe benefit package is a reasonable figure to impute. Both vocational experts testified that the 35 percent figure was an average of all employers. It seems unreasonable under these facts to use such the higher percentage (45 - 64 percent) for fringe benefits which is purportedly available in the medical field when it is unclear if claimant would actually pursue such a field given her restrictions and the need for additional education. The Board finds a fringe benefit of 35 percent of claimant's base wage is appropriate.

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[10] Weimholt Depo. at 19.

The Board finds claimant's post-injury imputed wage to be $540 ($400 base wage plus 35 percent ($140) in fringe benefits). When compared to the pre-injury average weekly wage of $692, this yields a wage loss of 22 percent.

Turning now to the task loss of the work disability equation, the ALJ averaged the opinions offered by both Dr. Downs and Dr. Carabetta and found claimant sustained a task loss of 48.875 percent. The Board affirms this 48.875 percent task loss.

When the 48.875 percent is averaged with the 22 percent wage loss, the result is 35.44 percent. The ALJ's Award is hereby modified to reflect this finding.

At oral argument the parties stipulated to a functional impairment. Thus, claimant's objection to the appointment of Dr. Carabetta under K.S.A. 44-510e(a) as the independent medical examiner, to provide an opinion regarding claimant's functional impairment is moot.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated June 22, 2004, is affirmed in part and modified in part.

The claimant is entitled to 67.57 weeks of temporary total disability compensation at the rate of $360.02 per week or $24,326.55 followed by 0.14 weeks of permanent partial disability compensation at the rate of $360.02 per week or $50.40 for a 15 percent functional disability followed by 128.31 weeks of permanent partial disability compensation at the rate of $360.02 per week or $46,194.17 for a 35.44 percent work disability, making a total award of $70,571.12.

As of December 14, 2004 there would be due and owing to the claimant 67.57 weeks of temporary total disability compensation at the rate of $360.02 per week in the sum of $24,326.55 plus permanent partial disability compensation at the rate of $360.02 per week in the sum of $46,244.57 for a total due and owing of $70,571.12, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of December 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Eric R. Lanham, Attorney for Self-Insured Respondent
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director